IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C. A. No. 222/1997
D.C. Mt. Lavinia No. 2212/L

1. A. T. Gunadheera
2. S. C. Gunadheera
both of No. 37/1, G.H. Perera Mawatha
Boralesgamuwa.

PLAINTIFFS

Vs.

1. J. H. Daisy Jayakuru
2. N. B. Karunasiri
both of No. 34/2, Dehiwala Road,
Boralesgamuwa.

DEFENDANTS

Between

1. J. H. Daisy Jayakuru
2. N. B. Karunasiri
both of No. 34/2, Dehiwala Road,
Boralesgamuwa.

DEFENDANT-APPELLANTS

Vs.

1. A. T. Gunadheera
2. S. C. Gunadheera
both of No. 37/1, G.H. Perera Mawatha
Boralesgamuwa.

PLAINTIFFS-RESPONDENTS

And now between

1. A. T. Gunadheera
2. S. C. Gunadheera
   both of No. 37/1, G.H. Perera Mawatha
   presently of No. 120, University Road,
   Raththanapitiya, Boralesgamuwa.

PLAINTIFFS-RESPONDENT PETITIONERS

Vs.

1. J. H. Daisy Jayakuru
2. N. B. Karunasiri
   both of No. 34/2, Dehiwala Road,
   Boralesgamuwa.

DEFENDANT-APPELLANT RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: L. Kanuwararachchi with V. Manikkuge
For the Defendant-Appellants

D. P. Mendis P.C with J. G. Sanathkumara
For Plaintiff-Respondents

ARGUED ON: 15.09.2011

DECIDED ON: 25.11.2011

GOONERATNE:

This was an action filed in the District Court of Mt. Lavinia for a declaration of title to the land called Wetakeiyagaha Kumbura and Deraniyagaha Kumbura described in the 1st schedule to the plaint and eviction of the Defendants from the land described in the 2nd schedule to the plaint. The extent of the land in the 1st schedule according to the plaint is 1 acre 3 roods and the extent of land in the 2nd schedule is 11 perches. Defendant-Appellant in their answer filed in the District Court had prayed for a dismissal of Plaintiff's action and in prayer (b) sought a declaration of title to the land described in the schedule to the answer. It's extent is 5 palas of paddy sowing. Parties proceeded to trial on 18 issues.

The learned counsel for the Defendant-Appellant at the very outset of his submission to this court impressed upon this court on the affinity between action for a declaration of title and an action rei vindicatio. He more or less went to the extent to state that the case in hand is an action rei vindicatio and not an action for an declaration of title. He referred to the case of Latheef and another vs. Mansoor and another a judgment pronounced by Justice S. Marsoof reported in Bar Association Law Reports 2011 pg. 189. However I would before I proceed to give judgment on the

real issue as pleaded by Plaintiff, title to the property and ejectment and denial of title by Defendant, the authorities cited with approval in the above judgment itself would clarify the position and consider the distinction if any.

The learned counsel for Appellant drew the attention of court to paragraph 13 of the plaint, re forcible occupation of Defendant-Appellant. I would refer to certain extracts from the above decided case merely to consider it's importance. Nevertheless the suit in hand as described by Plaintiff is for a declaration of title but it seems to be and action rei vindicatio, but in this regard alone, I am reluctant to decide in favour of either party without considering the merits of the case. It seems both declaration of title and rei vindicatio concerns ownership. There cannot be a real distinction. Further there is a total denial of title of Plaintiff by Defendant except for a very small portion of land as urged by Appellant, apparent from deed P5 and extract X1.

Clearly, the action for declaration of title is the modern manifestation of the ancient vindicatory action (*vindicatiorei*), which had its origins in Roman Law. The *actio rei vindicatio* is essentially an action *in rem* for the recovery of property, as opposed to a mere action *in personam,* founded on a contract or other obligation and directed against the defendant or defendants personally, wherein it is sought to enforce a mere personal right (*in personam*). The *vindicatio* form of action had its origin in the *legisactio* procedure which symbolized the claiming of a corporeal thing (*res*) as property by laying the hand on it, and by using solemn words, together with the touching of the thing with the spear or wand, showing how distinctly the early Romans had conceived the idea of

individual ownership of property. As Johannes Voet explains in his *Commentary on the Pandects* (6.1.1) "to
vindicate is typically to claim for oneself a right in re. All actions *in rem* are called vindications, as opposed to personal actions or conductions." Voet also observes that –

> For the right of ownership springs the vindication of a thing, that is to say, an action *in rem* by which we sue for a thing which is ours but in the possession of another. (*Pandects 6.1.2*)

.....

An important feature of the actio rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title. Wille's Principles of South African Laws (9th Edition – 2007) at pages 539-540 succinctly sets out the essentials of the rei vindicatio action in the following manner:-

> To succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration (emphasis added).

In Abeykoon Hamine v. Appuhamy (1950) 52 NLR 41, Dias, SPJ. quoted with approval, the decision of a Bench of four judges in De Silva v. Goonetilleke (1931) 32 NLR 27 where Macdonell, C.J., had occasion to observe that –

> There is abundant authority that a party claiming a declaration of title must have title himself." To bring the action rei vindicatio plaintiff must have ownership actually vested In him". 1 Nathan P. 362, s. 593... This action arises from the right of dominium ... The authorities unite in holding that plaintiff must show title to the corps in dispute, and that if he cannot, the action will not lie".

In Dharmadasa v. Jayasena (1997) 3 Sri LR 327 G.P.S de Silva, C.J., equated an action for declaration of title with the rei vindicatio action, and at page 330 of his judgment, quoted with approval the dictum of Heart, J., in Wanigaratne v. Juwanis Appuhamy (1962) 65 NLR 167, for the proposition that the burden is on the plaintiff in a rei vindicatio action to clearly establish his title to the corpus, echoing the following words of Withers, J., in the old case of Allis Appu v. Endris Hamy (1894) 3 SCR 87 at page 93.

> In my opinion, if the plaintiff is not entitled to revindicate his property, he is not entitled to a declaration of title ... If he cannot compel restoration, which is the object of a rei vindicatio, I do not see how he can have a declaration of title. I can find no authority for splitting this action in this way in the Roman-Dutch Law books, or decisions of court governed by the Roman-Dutch Law.

As Ranasinghe, J., pointed out in Jinawathie v. Emalin Perera (1986) 2 Sri LR 121 at page 142, a plaintiff to a rei vindicatio action "can and must succeed only on the strength of his own title, and not upon the weakness of the defence." In Wanigaratne v. Juwanis Appuhamy, (1962) 65 NLR 167 at page 168, Heart, J., has stressed that "the defendant in a rei vindicatio action need not prove anything. Still less his own title."

I have to emphasise at the very beginning a fact as held by the learned District Judge (pg. 155 of judgment) to be noted and this court shall not disturb such findings. That is on possession and the Plaintiff's predecessors in title had not possessed or that the available evidence does not favour the Plaintiff-Respondent, since evidence is not sufficient to prove possession. As such Plaintiff has to rely on paper title. Trial Judge's view on possession need not be disturbed. But the trial Judge refer to the evidence of

Surveyor Joy de Silva (P1 – P4) and state that only evidence of possession is of that evidence of Joy de Silva. P1 in 1971 & P2 in 1985.

The oral submissions made to this court and the written submissions of the Appellant very strongly suggest a fundamental weakness in the case of the Plaintiff re – the chain of title does not support the extent referred to in the schedule to the plaint. In brief the original owners referred to in paragraph 2 of the plaint transferred the property to Avneris Perera by deed No. 25246 of 10.8.1927. (P1 annexed to plaint and P5). The said Avneris Perea owned a portion of land on the strength of deed P5 and the sons of Avneris Perera described in the plaint called Stephen and Wilbert could only deal with what was inherited or owned by their father Avneris Perera. In that way what was ultimately transferred to plaintiffs would lack proper title if deed P5 it's extent does not tally with the schedule to the plaint. This is something demonstrated by the Appellant. In that way Appellants contends as follows:

(a) denies the schedule to the plaint. In the case admitted the land shown in plans P3 & P7. (boundaries are incorrect).
(b) Title and possession of D. Avneris Perera disputed (only to the extent in deed P.5 admitted).

Deny Stephen and Wilfred were children of D. Avneris Perera – Deny P1 annexed to plaint.

Deny title devolved on Hegoda or the Plaintiff.

Burden of proof lies with Plaintiff to prove title.

Plaintiff has not prescribed to the land (learned trial Judge's observation in the judgment at pg 155 (last paragraph)) confirm this point.

I have to incorporate the following extracts from the written submissions of Appellant since this is a case concerning title dependent on paper title, as possession cannot be established with certainty on the evidence of plaintiffs party.

(c) Plaintiffs have not framed any issue on prescription. Therefore it is very clear that the plaintiffs are not claiming title on prescription.

(d) Considering the totality of the evidence led at the trial it is very clear that the Plaintiffs have not proved their title in any manner

(e) As submitted above, in absence of any evidence the learned District Judge has seriously misdirected himself when he answered the issue No. 2 in affirmative.

(f) The transfer of the corpus to Gamini de Silva Hegoda by said Stephen Perera and Wilbert Perera was clearly a cover-up.

(g) Although said Gamini de Silva Hegoda has purportedly purchased the land on 23rd of February 1987, he has instructed the Surveyor Joy de Silva to prepare a plan in 1985.
(vide page 6 of the proceedings dated 08.06.1993)

"ඊට පස්සේ නැවතත් 1985 දී මෙම ඉඩම මැන්නා 1973 පිඹුර සකස් කලේ 1985/11/10 වන දින අංක 1973 දරණ පිඹුර පැ. 2 වශයෙන් ඉදිරිපත් කරනවා. එම පිඹුර සකස් කලේ හැගොඩ මහතාගේ ඉල්ලීම මතයි ..... 1985 දී නැවතත් මේ ඉඩම මැන්නා. මේ ඉඩම හැගොඩ මහතාට කැබලි කරන්න උවමනාව තිබුණා"

(h) If this Gamini de Silva Hegoda became the owner in 1987 what were his interests to the land in the year 1985? To this Hegoda's explanation is hardly acceptable. (vide page 3 of proceedings dated 09./06/1994.

ඔමන්තගේ ස්ටිවන් පෙරේරා හා ඔමන්තගේ විල්බට් පෙරේරා කියන අය සමග ගිවිසුමකට යටත්ව තිබුණා මෙම ඉඩම ගැන. ඔප්පුවකින් නෙමෙයි මුදල් ඉල්ලුවට මා මුදල් දිලා තිබුණා.

(i) In fact this witness's explanation was that he had an oral agreement with Wilbert Perera and Stephen Perera which is hardly acceptable. Specially when Stephen Perera was not called as a witness causes serious doubt as to the whole transaction.

(j) As it is visible from the evidence adduced by the plaintiffs that the said Gamini de Silva Hegoda has found this land and wanted to block out and sell. In order to legalize his actions he has got a deed of declaration prepared and immediately within one month of this deed of declaration has got a transfer in his favour.

(k) The witness Gamini de Silva Hegoda clearly admitted that before execution of deed of transfer in his favour he was aware that so called original owners Stephen Perera and Wilbert Perera did not have paper title.
(vide page 4 of proceedings dated 09/06/1994)

"නිතිඥ මහතා ඉඩම කාර්යාලයෙන් පරීක්ෂා කරන්න කියලා මා කලින් කිව්වා. එසේ පරීක්ෂා කොට නිතිඥ මහතා කිව්වා මෙම ප්ලැන අනුව මෙම ඔප්පුව ලියා ගන්න කියා නිතිඥ මහතා කියූ දේ තමයි මා කිව්වේ"

ප්‍ර අයිතිවාසිකම් මොනවාද කියලා දැනගත්තා

උ මට කිව්වා නිතිඥ මහතා මෙම ප්ලැන අනුව මේ ඉඩම මිලදි ගන්න කියලා කිව් දේ තමයි මම කියන්නේ.

ප්‍ර ඔප්පුව ගැන මොනවද කිව්වේ.

උ ප්‍රමාණයක් ගැන මොකවත් කිව්වේ නැහැ.

(l) Therefore it is very clear that Hegoda has executed the purported deed of transfer knowing very well that Stephen Perera and Wilbert Perera did not have any title to the property

(m) To facilitate this only this Hegoda has got Stephen Perera and Wilbert Perera to prepare this purported deed of declaration පැ 6.

(n) As the transferees of පැ 7. Stephen Perera and Wilbert Perera did not have any title to the corpus. Gamini de Silva Hegoda also did not get any valid title and the Plaintiffs who purportedly purchased from Hegoda just after two years of the said deed of declaration also do not get any valid title as the origin of title is bad in law

I have also gathered from the original case record the following material which invite this court to consider the extent of the property concerned derived from deed marked P5. In the oral submissions before me

learned counsel for Appellant made a point which favour the Appellants as follows emerging from deed P5.

(i) The land called Wetakeiyagahakumbura described in the deed No. 25246 dated 10.08.1927 marked එ 5 is only in extent of 8 kurunies of paddy sowing area – (vide එ 5 and extent of registration M 281/26 file of record by the defendants.

(ii) The aforesaid four persons transferred 1/6 of ½ of undivided ½ of the above that is of 8 kurunies to one Omattage Awneris Perera by the said deed marked එ 5.

(iii) A kuruni is equal to 10 perches (vide Legal Dictionary for Ceylon by E. B. Wickremanayake Q.C at page 127) accordingly 1/24 of 8 kurunies is equal to 80 x 1/24 perches that is 3.34 perches.

(iv) In the circumstances if any title has passed on deed එ 5 to Awneris Perera it will be only for 3.34 perches and not to A1-R3-P0.

(v) Thereafter on 23.01.1987 according to deed No. 1099 marked එ 6 two persons who are alleged to be the two sons of said Awneris Perera have executed a deed of declaration which states that under Deed එ 5 said Awneris Perera became the owner of the land called Wetakeiyagahawatta and Deraniyagawa Kumbura (vide last recital of එ 6 at page 1). The schedule to the deed එ 6 gives the extent as A2 – R0 – P15. according to Plan No. 159 dated 15.09.1971 marked එ 1.

(vi) Patently the 1st recital in page 1 of එ 6 is in conflict with the land described in the deed marked එ 5.

(vii) In paragraph 2 of the schedule of එ 6 gives the extent as (1/6) of one half (1/2) of – Wetakeiyagahawatta whereas in fact deed එ 5 bearing No. 25246 referred to a land called Wetakeiyagahakumbura and the share as 1/6 of ½ of ½.

There is much emphasis on the part of the Appellant regarding the deed marked P5. Perusal of deed P5, there is something that I need to comment. The said deed is not legible at all (folio 189 of the original case record). Further it appears to be a photo copy but initialed by the trial Judge and the date appearing just below the initials of the trial Judge appears to be 10.03.94, marked through witness Shaminda Silva. Hagoda (person who sold the property to Plaintiff). The evidence led on 15.3.1994, according to the said days proceedings. Even though the exact date do not tally that could be excused, in the way it is written. Then immediately after marked document P5, is a typed written copy of deed 25246 (folio 193). This court is unable to gather from the proceedings whether there was any arrangement between parties and court to permit the Appellant to tender a typed copy of deed 25246 since obviously P5 is illegible and not clear at all. In the proceedings the witness states that since there are other lots contained in deed P5 the owner had not parted with the original deed and witness agreed to produce the original deed in cross-examination. This witness was cross-examined on 9.6.1994. On that day deed P5 was produced, I believe it was the photo copy marked P5 (not the original).

In cross-examination witness being questioned on deed P5 admits that the land relevant to the case is referred to in the 8th schedule of P5. The questions posed in cross-examination was put in such a way to get the replies from the witness to support (i) to (vii) (at pgs. 11/12) of this judgment. The witness though reluctant to admit same denies any knowledge of the calculation referred to therein with reference to the extent but it appears to court that witness reluctantly or indirectly admits that P5 & P6 differ in extent. Even in the absence of oral evidence comparison of the said deeds the Appellant's views on same appears to be in order.

At this point it would be necessary to consider the views of the District Judge as regards witness Hegoda. (folio 148, 149 &150). His evidence is considered, but merely a gist of his evidence is narrated. The learned trial Judge has referred inter alia to his evidence in cross-examination as follows re-deed P5 .... පැ 5 දරණ ඔප්පුවේ 8 වන උප ලේකණයෙන් 1/34 න් 1/6 ක් පමණ කැබැල්ලක් ඇති බවත්, වැටකෙයියා ගහ කුඹුර වී කුරුණි 8 ක් බවත්, වී කුරුණි 8 ක් කියන්නේ පරවස් 80 ක් දැයි නොදන්නා බවත්, වී කුරුණි 8 න් නොබෙදූ 1/6 න් ½ න් ½ ක් ලැබී ඇති බවත් කියා ඇත.

The trial Judge has narrated the evidence briefly of Somapala Gunadeera who testified that prior to purchase of the land in dispute he

examined the property and plans marked P1 – P4, and being satisfied purchased the property. He also states that whilst he was filling the property with earth some person objected and he informed the seller. He refer to complaint marked P10 and refer to the area of 11 perches.

It would be relevant to consider the evidence of Surveyor. The Surveyor in his evidence state that in 1971 when he surveyed there was no plan to be guided and prepared the boundaries on the plan as shown to him. The land in question was a grass field. Lot 1b in plan P2 was shown as separated. The evidence in it's entirety of the surveyor gives the impression of identity of land is not so precise, and Surveyor did the survey to suit the requirements of persons who directed the Surveyor or those who obtained his services. The following extract from the Surveyor evidence need to be noted (in cross-examination as narrated by the trial Judge).

පැ 4 පිඹුර සකස් කිරීමට සිදුවුයේ මායිම් ප්‍රශ්ණයක් හේතුවෙන් බවත් ගුණධිර මහතාගේ උපදෙස් අනුව බවත් කියා ඇත. පැ 4 අදිෂ්ඨපනයක් කර ඇති බව කියා ඇත. 1973 (පැ 2) පිඹුරේ මායිම් හුගක් වෙනස් වී ඇති බව පිලිගෙන ඇත. පැ 4 පිඹුරේ දකුණු මායිමෙන් අල්ලා ගත් ප්‍රමාණය පර්චස් 11 ක් බව සඳහන් කර ඇති බව කියා ඇත. 2414 (පැ 4) සඳහා සම්පුර්ණ ඉඩම මැන්නේ නැති බව කියා ඇත. පැ 4 අදිෂ්ඨපනය කලේ මුලු ඉඩමේ හතර මායිම් මනින්නේ නැතිව බව පිළිගෙන ඇත. පස බුරුල් නිසා මායිම් ගල් දමන්න විදියක්

නැති බවත් කියා ඇත. විත්තියෙන් යෝජනා කර තිබුනේ ඉඩමට නොගොස් මෙම පිඹුර සැදූ බවයි. සාක්ෂිකරු එම යෝජනා ව ප්‍රතික්ෂෙප කර ඇත. පැ 2, 3 හදන්න උපදෙස් දුන්නේ හැගොඩ බවත් පැ 4 හදන්න උපදෙස් දුන්නේ ගුණධර මහතා බවත් කියා ඇත.

I have already observed that deed P5 is a very unclear, illegible photocopy, of 1927 year old deed. Merely because the deed is old and cannot be read would not mean that the extent contained in the deed could be manipulated for some persons benefit. You can give what you have and own and not what you do not have and do not own. The procedure for tendering a document at a trial is dealt in Section 154 of the Civil Procedure Code. However failure to object has resulted in the admission of the documents. At this point I would also refer to Mohamed Vs. Lebbe & others 1996 (2) SLR 62 .....

The Plaintiff-Respondent claimed that the Deed of Revocation was on 9.6.1969 (before P5) the 3rd Defendant Appellant claims that it was on 18.6.1969 (After P5).

The District Court held with the Plaintiff.

Held:

(1) On examining the original Deed P2 the duplicate, and the protocol it is quite clear that there are interpolations, alterations and amendments and all copies are not exact copies.

Furthermore the 1st Defendant Respondent denied having consented to the said revocation, as seen by her letter to the Registrar wherein she had on 16.6.1969 objected to any transfer of her property which she got on P1.

(2) It is also strange that the Attesting Notary was not called as a witness, instead the Plaintiff-Respondent called the Clerk, according to whom the protocol only was filled and signed and the signatures of all concerned were obtained in blank forms which were later filled.

This was illegal, and therefore there was no due execution of the deed,

(3) The net result of this exercise is that transaction that took place is not genuine, and therefore the Deed of Revocation is invalid for want of due execution and that title passed to the 3rd Defendant-Appellant.

It was submitted that there was no issue raised on the due execution of the Deed and as such the Court should not rule on the due execution of the Deed of Revocation.

Per Anandacoomaraswamy, J.

> "Issue can be raised upon evidence and in the course of the trial and even before judgment, the evidence upon which this issue arises was tendered by the Plaintiff-Respondent and he cannot be heard to complain against it. Further no court can turn a blind eye to such an illegality which if condoned would be a blot on the sanctity attached to notarially attested documents.

Let me also consider again the case of Cinemas Ltd Vs. Sounderarajan 1998 (2) SLR 16 ....

(1) In a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal – S. 154 CPC (explanation).

(2) Where one party to a litigation leads prima facie evidence and the adversory fails to lead contradicting evidence by cross-examination and also fails to lead evidence in rebuttal, it is a "matter" falling within the definition of the word "proof" in the Evidence Ordinance and failure to take cognizance of this feature and matter is a non-direction amounting, to a misdirection.

(3) Once a Court accepts and acts on a proxy or a power of attorney presumably because no defect appears on the face of such document, any party who desires to question the authority of that document has the onus of showing, the want of authority. This rule is based on the presumption – omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium.

On the other hand Defendant though have claimed title to this land, has not been able to prove same. No deeds/plans according to accepted procedure were produced to enable court to consider title or identity of property of the Defendant (as in the dicta of the case in 1981 (1) SLR 18). In an action of this nature burden is on Plaintiff to establish title. Defendant need not prove anything except when Defendant claim to be owner by prescription. I do not fault the learned District Judge's answers to the issues raised by the Defendants. The Defendants relief prayed for in the answer cannot be granted.

In all the circumstances of this case I am convinced that the chain of title does not support the extent referred to in the schedule to the plaint. District Judge should have considered the extent transferred from deed P5 and whether such a deed of declaration (P6) tally as regards the extent with deed marked P5. In the absence of a proper valid clear copy of deed marked P5, and for the above reasons, it would not be possible to grant the declaration prayed for in the prayer to the plaint. If it could be established that the extent transferred on deed marked P5 is similar to the extent referred to in deed marked P6, Plaintiffs would be entitled to a declaration of title to such extent only. This is something that need to be clarified, as the Plaintiff could only rely on paper title.

I am mindful of the long delay in the disposal of this case. That cannot prevent the Court of Appeal to set aside the judgment of the District Judge. In all the circumstances of this case I am reluctantly compelled to set aside the judgment of the District Court and send the case back for re-trial.

Re-trial ordered.

JUDGE OF THE COURT OF APPEAL